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No. 88, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA
Plaintiff,

vs.

STATE OF TEXAS, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

AND

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of California, by its duly authorized representative, Kenneth Cory, Controller, asks leave of the Court to file its Complaint against the State of Texas and other named parties submitted herewith.
March 12, 1981.

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT*

JURISDICTION

The original jurisdiction of the Court is invoked pursuant to Article III, Section 2 of the Constitution of the United States

* This Motion is intended to be considered together with the Petition for Writ of Certiorari filed in *Controller of the State of California v. Attorney General of the State of Texas,* No. 80-____, seeking review of the decision of the Court of Appeals for the Fifth Circuit in *Lummis v. White,* 629 F.2d 397 (5th Cir. 1980) (hereafter cited as "Cert. Pet.").

and 28 U.S.C. § 1251. The controversy concerns inconsistent claims by California and Texas that Howard R. Hughes was a domiciliary at the date of his death. If each state successfully imposes a domicile-based death tax in its own courts, the resulting state and federal tax claims will exceed the available assets of the estate. California asserts a lien on intangible assets of the Estate which is inconsistent with a like lien asserted by Texas. Collection of the Texas tax would interfere with California's property right in the lien it has on all intangible assets of the Estate, and would prevent California from collecting the entire death tax due it. The proposed Complaint accordingly seeks a determination of Hughes' domicile on the date of his death.

Jurisdiction to resolve inconsistent claims of domicile for state inheritance tax purposes in identical circumstances was established in *Texas v. Florida,* 306 U.S. 398 (1939). That decision has never been overruled, although three Justices of this Court have suggested that it was incorrectly decided. *California v. Texas,* 437 U.S. 601, 602 (1978)(Stewart, J., joined by Powell and Stevens, JJ., concurring).

In *California v. Texas, supra,* a similar motion for leave to file a complaint was denied. The Court gave no explanation for the decision. Changed circumstances impelled the filing of the present motion. As more fully discussed hereafter (*see* pp. 12-13, *infra*), several factors which may well have entered into the Court's decision not to apply *Texas v. Florida, supra,* to the previous application are no longer present. One such factor was the existence of a conditional settlement agreement between California and the Estate which Texas urged rendered the case collusive and not founded upon a justiciable case or controversy. That agreement is now a nullity; there is now no settlement agreement of any kind between California and the Estate. Texas also urged that the controversy was not ripe for adjudication because the issues could be affected by the pending claim of Howard Hughes Medical Institute ("HHMI") that a "lost will" left the entire estate to a charitable foundation and

the contention that the so-called "Mormon Will", which also purported to make substantial charitable bequests, was a valid testamentary instrument. The "Mormon Will" has now been definitively rejected following a trial by jury; likewise, the HHMI "lost will" claim has been rejected by the Nevada Supreme Court and by the Texas Probate Court. Complaint ¶2(b).

Another factor, expressly identified by Justice Brennan as the basis for his vote to deny the prior motion (*see id.* at 601 (Brennan, J., concurring)) was the possibility that the risk of inconsistent adjudications of domicile could be avoided by a statutory interpleader action in a federal district court. Although *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937) had held that the Eleventh Amendment barred such an action, four justices suggested that *Worcester County* was no longer authoritative. However, none of the concurring opinions addressed the technical requirements of subject matter jurisdiction under the Federal Interpleader Act. For reasons explained at pp. 13-21 *infra,* and in the accompanying Petition For Certiorari in *Controller of the State of California v. Attorney General of the State of Texas,* the terms of the Interpleader Act do not confer district court jurisdiction to resolve this controversy. However desirable it may be to have a mechanism for the resolution of multi-state death tax disputes in a lower federal court, the Federal Interpleader Act was not designed for that purpose. The Hughes Estate has attempted to invoke it, and the result to date has been eloquent testimony that the use of the Act in this context tries to force a square peg into the proverbial round hole. Accordingly, it can now "be shown that two States may possibly be able to obtain conflicting adjudications of domicile." *California v. Texas, supra,* 437 U.S. at 601 (Brennan, J.). For this and other reasons hereafter discussed, a proceeding under the Interpleader Act is not an available or appropriate alternative to an original suit here. Jurisdiction is therefore properly invoked under *Texas v. Florida, supra.*

STATEMENT

On April 5, 1976, Howard Robard Hughes, Jr. died in a chartered jet which was rushing him from Mexico to a hospital in Texas. His sizeable estate is now the subject of probate proceedings pending in California, Texas, and Nevada, each of which was arguably the state of Hughes' domicile.[1]

Both California and Texas contend that Hughes was a domiciliary of their respective jurisdictions. Each state accordingly seeks to collect the resulting inheritance tax on all intangible assets of the Estate. The effect of the multiple taxation by both California and Texas would be the imposition of death taxes which substantially exceed the net assets of the Estate. The effective rate of tax in California on all amounts in excess of $400,000 is 24% (*see* CAL. REV. & TAX. CODE § 13406(g));[2] the effective rate of tax in Texas (including the so-called "pick-up tax") on amounts exceeding $1,000,000 is approximately 16% (*see* TEX. TAX CODE ANN. ARTS. 14.05, 14.12); and the federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes (*see* 26 U.S.C. §§2001, 2011). The combined marginal rate of tax is therefore 101%. Complaint ¶ 22. Interest on the unpaid taxes is accruing at the rate of 12% (except on the Texas tax, which accrues interest at 6%), increasing the total tax liability. *Id.* Moreover, some actual expenses of the Estate are not fully deductible in computing these various death taxes. *Id.* The shortfall if both Texas and California obtain favorable judgments is therefore likely to be even greater than adding the several tax rates together would suggest. The total state and federal taxes and interest claimed substantially exceed the available assets of the Estate. *Id.*

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[1] There are also probate proceedings pending in Louisiana and Delaware but no claim has been advanced that Hughes was a domiciliary of either of those states.

[2] Under California law, decedent's next-of-kin (and, *a fortiori*, the remaining heirs) are classified as "Class C Transferees", who are subject to the maximum rates. Lesser rates would have been applicable if Hughes had left a wife, lineal issue or nieces or nephews. *See id.* §§13307, 13308, 13309.

Texas has secured a verdict, after a trial by jury in a Texas state court, finding that Hughes was a domiciliary of Texas. Complaint ¶15. California has been restrained from proceeding in its own courts by the federal proceeding described below. If the Court does not allow the invocation of its original jurisdiction, California is prepared to press its domicile claim in its courts, unless restrained from doing so, even though the result will be inconsistent state court determinations.

As a result, Texas and California are on a collision course. Texas asserts a statutory lien on all intangible assets of the Estate; California alleges that its own lien on those same assets is valid and that the Texas lien is not. Complaint ¶24. Further, whichever state perfects and executes its judgment will irreparably injure the other by depriving it of the very assets needed to satisfy the tax. There is substantial reason to believe that Texas will precede California in executing upon a final judgment. The overwhelming majority of the Estate's tangible assets are located outside of California, and of course the Estate intends to administer the intangible assets in one or more states other than California. Complaint ¶26. Accordingly, it is likely that California will be irreparably injured by being unable to satisfy its judgment for taxes and interest. *Id.*

In November, 1977, California sought to avoid these unfortunate consequences by filing a motion for leave to file a complaint under this Court's original jurisdiction. The Court denied California's motion. *California v. Texas, supra.* As noted, the Court gave no explanation for its action, although concurring opinions for four Justices suggested that the Eleventh Amendment no longer barred the use of the Federal Interpleader Act (28 U.S.C. §1335) as a means of obtaining a determination of domicile binding on all parties. The present motion has been filed because it can now be demonstrated that even if the Eleventh Amendment no longer applies, the suggested alternative means of resolving the controversy—a statutory interpleader proceeding in a United States District Court—is *not* possible; even if it were, it would be a wholly

unsuitable and unfair means of adjudicating the conflicting domicile claims of California and Texas.

As shown in Part II(A), *infra,* even if the Eleventh Amendment no longer imposes a barrier, the particular jurisdictional requirements of the Federal Interpleader Act cannot be satisfied in cases of this kind. Although in *Lummis v. White,* 629 F.2d 397 (5th Cir. 1980) the Court of Appeals for the Fifth Circuit reached a contrary conclusion based upon an anomalous feature of California law (*see* Cert. Pet. at 12), that statute has been revised and the basis upon which the Court of Appeals found jurisdiction is no longer present. *See* pp. 18-20, *infra; see also* Cert. Pet. at 18-23. Moreover, at least after jurisdiction attaches, an interpleader action instituted by an estate against two or more states becomes a "controvers[y] between two or more States" within this Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a) because the rival states are thereby required to contest their domicile claims against each other. *See* Part II(B), *infra.* In any case, as shown in Part II(C), *infra,* an important factor not considered in *California v. Texas* renders the Interpleader Act an unfair and inappropriate alternative remedy. Under the Act, venue can only be laid where the "claimants" reside, which means that one state's death tax claim will be decided by a jury of citizens of the rival state. Only through the exercise of this Court's original jurisdiction can there be assured a neutral forum appropriate for the resolution of a controversy between, and affecting the vital interests of, two sovereign states.

ARGUMENT

I.

UNDER *TEXAS V. FLORIDA*, THIS COURT'S ORIGINAL JURISDICTION HAS BEEN PROPERLY INVOKED.

The Court's jurisdiction to adjudicate the conflicting domicile claims of California and Texas is established by *Texas v. Florida,* 306 U.S. 398 (1939). There, on facts remarkably like those presented here, the Court accepted jurisdiction over an

original proceeding involving conflicting inheritance tax claims by four states, each of which had asserted that the decedent was a domiciliary. The Court acknowledged that inconsistent adjudications of domicile and the accompanying imposition of multiple inheritance taxes were constitutionally tolerable (*id.* at 410; *see* pp. 13-14, *infra*) and that the judgments of each state assessing tax liability were binding upon the parties to the proceedings and entitled to full faith and credit. *Id.* But while no federal question is presented by multiple and inconsistent imposition of domicile-based inheritance taxes, the Court found appropriate the invocation of its original jurisdiction where the claims of the respective states (and the federal estate tax) exceeded the net assets of the estate:

> "The essential of the bill in the nature of interpleader is that it calls upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims where the plaintiff himself claims an interest in the property of fund which is subjected to the risk. The object and ground of the jurisdiction are to guard against the consequent depletion of the fund at the expense of the plaintiff's interest in it and to protect him and the other parties to the suit from the jeopardy resulting from the prosecution of numerous demands, to only one of which the fund is subject." (*Id.* at 406-07). [3]

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[3] Justice Stewart summarized the decision in *Texas v. Florida* in his concurring opinion in *California v. Texas,* supra:

> "Although none of the parties raised any question of this Court's jurisdiction, the Court considered the question sua sponte. It held that since the suit was between States, Art III, §2 of the Constitution conferred original jurisdiction to decide the case so long as 'the issue framed by the pleadings constitutes a justiciable "case" or "controversy" within the meaning of the constitutional provision and . . . the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence . . . .' 306 U.S. at 405.

(footnote continued on following page)

The present case is squarely within the holding of *Texas v. Florida*. Here, as in that case, there is a "fair probability" of inconsistent findings of domicile resulting in death taxes in excess of the Estate's assets. Indeed, that result is far more probable than it was in *Texas v. Florida*. In this case, Texas has already obtained a favorable jury verdict finding a Texas domicile. The risk of an inconsistent finding by a California tribunal is a substantial one. Like the decedent in *Texas v. Florida, supra*, Howard Hughes lived so "as to afford substantial basis" (306 U.S. at 411) for multiple claims of domicile.

Born in Houston, Texas in 1905, Hughes resided in Texas until 1926 when, at the age of 20, he moved to California. From the time he moved to California until the day he died, Hughes apparently returned to Texas only for occasional visits. Nonetheless, he continued to use Texas as a mailing address and occasionally claimed Texas as his domicile long after he ceased to have any physical presence there.

(footnote continued from previous page)

> "The Court found such a basis for relief by analogizing the suit to a bill in the nature of interpleader. This procedure had developed in equity to avert the 'risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty' by requiring the claimants to 'litigate in a single suit their ownership of the asserted claim.' *Id.* at 405-406. Since the law of each of the claiming States provided that a decedent could be domiciled in only one State for purposes of death taxes, the Court held that the competing tax claims were in fact conflicting claims to the same single legal duty.
>
> "Thus viewing the suit as one in the nature of interpleader, the Court also found that the controversy was ripe for decision. Since each State's claim was sufficiently substantial to support a finding of domicile, there was a 'fair probability' that each would be successful in its own courts and that the estate's assets would be insufficient to meet all of the claims. The Court therefore found a justiciable present controversy in the substantial 'risk of loss[to] the state lawfully entitled to collect the tax.' *Id.*, at 410-411. The Court perceived no jurisdictional frailty in the fact that none of the claiming States had completed proceedings to collect its inheritance tax, since a plaintiff in an interpleader action was ordinarily not required to await actual institution of independent suits: '[I]t is enough if he shows that conflicting claims are asserted and that the consequent risk of loss is substantial.' " (437 U.S. at 604-06).

Hughes lived in California for 40 years, from 1926 to 1966. During this time, he developed substantial new business interests and investments, including film production, aviation and aircraft manufacture, and numerous other ventures in California. Until his death, the center of his business operations remained in California, although he acquired substantial property elsewhere, both directly and through his wholly-owned corporation, known in later years as Summa Corporation.

In 1966, Hughes travelled to Boston, where he spent five months. He then travelled to Las Vegas, where he remained until 1970. Thereafter he moved his retinue from place to place, travelling successively to the Bahamas, Nicaragua, Vancouver, London, and the Bahamas again, eventually arriving in Acapulco, Mexico. So far as is known, Hughes formed no personal roots in Nevada or in any subsequent location, living in almost total seclusion in a hotel room from which he seldom, if ever, ventured. In early April, 1976, while in Acapulco, Hughes became critically ill and was rushed by plane for medical treatment to Houston. He died en route.

While even this bare outline of Mr. Hughes' life demonstrates that different jurisdictions applying the same legal definition of domicile could well reach conflicting conclusions, there are several additional reasons why inconsistent findings of domicile are entirely likely. First, Hughes made "numerous self-serving statements . . . as to his domicile, which, because made for the purpose of avoiding liability for state . . . taxes levied on the basis of domicile, tended to conceal rather than reveal the true relationship" (*Texas v. Florida, supra*, at 411) of Hughes to the various jurisdictions in which domicile is claimed. Second, Hughes' business interests and investments were extraordinarily diverse, both in terms of geographical location and field of commercial endeavor, despite the fact that the "communications center," through which he controlled his vast empire, remained in California throughout his travels. Finally, the usual indicia of domicile, such as the establishment of a permanent place of residence, the presence or absence of

personal effects and community involvement, are absent in this case. Hughes lived in an unusual, indeed, bizarre manner. "Home" for Hughes during the last ten years of his life was a series of barren hotel rooms from which social and business visitors were almost entirely excluded. One of the world's richest men lived in a virtually sealed capsule, communicating with his empire at long distance. It hardly mattered where that capsule was.

This case is thus a paradigm of the problems inherent in the domicile concept. While the "hornbook law" of domicile of both California and Texas can be simply stated—"domicile" equals "physical presence" plus "intent to remain"—the concept of domicile is easier to define than to apply. Not only does one legal concept have to fit an infinite variety of living situations, the determination of domicile usually hinges on the elusive finding that the decedent intended to make a place his home. And what at first blush may appear as most direct evidence of requisite intention—a person's statements—will often be more the reflection of calculated advantage than of an actual intention to establish a permanent home. *See Texas v. Florida, supra*, at 411. That will also be true in this case. The risk of inconsistent adjudications of Hughes' domicile is thus exacerbated by the manner in which decedent lived, by what he said, and by the ephemeral nature of the domicile concept.[4]

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[4] Professor Reese has succinctly described the difficulties inherent in the ascertainment of domicile:

> "The rules relating to the determination of domicile are extremely general and flexible in operation, revolving as they generally do around the intention to make a home. And, in close cases, differing inferences as to this intention can easily be drawn from the evidence presented. . . .[¶] The rules of domicile are extremely flexible in application, both because of their generality and because they depend so frequently in ultimate analysis upon the determination of a question of fact as to the individual's attitude of mind towards the place in question." (Reese, *Does Domicile Bear a Single Meaning?*, 55 COL. L. REV. 589, 591-96 (1955)).

Justice Stewart, who urged in *California v. Texas* that *Texas v. Florida* should be overruled, forthrightly stated that the proposed complaint in that prior application was squarely within the jurisdictional path established in *Texas v. Florida:*

> "The facts alleged in the complaint now before us are indistinguishable in all material respects from those on which jurisdiction was based in *Texas v. Florida.* This Court has original and exclusive jurisdiction of disputes between two or more States, 28 U.S.C. §1251(a)(1) and it has a responsibility to exercise that jurisdiction when it is properly invoked. *See Cohens v. Virginia,* 6 Wheat. 264, 404; *Massachusetts v. Missouri,* 308 U.S. 1, 19-20. If *Texas v. Florida* was correctly decided, the Court, therefore, is under a duty in this case to grant California's motion to file its complaint." (437 U.S. at 606).

In an important respect this case is an even stronger one for the exercise of the Court's original jurisdiction than *Texas v. Florida, supra.* In that case the total net estate was exceeded by death taxes only on the hypothesis that, in addition to the federal estate tax, inheritance taxes would be levied by no less than *four* states; if only one of the four claimant states failed to establish domicile in its tax proceedings, the assets of the estate would have been sufficient to satisfy the tax claims of those remaining. In short, jurisdiction was founded upon the "danger that out of the same events four state courts will spell four different domiciles . . . ." 306 U.S. at 431 (dissenting opinion). In the present case, the high rates of taxation which are applicable create a circumstance in which the courts of only *two* states need disagree as to the decedent's domicile for the assets of the Estate to prove insufficient to meet the resulting tax claims. And, unlike *Texas v. Florida,* one of those states —Texas—already has a favorable jury verdict.

Nevertheless, this Court denied the prior motion for leave to file. We do not know, of course, the reasons which impelled the Court to do so, other than those expressed by four Justices

in concurring opinions. But a number of factors urged in opposition to the prior motion, some of which may have influenced the Court, are no longer even arguably applicable as grounds for denying leave to file the Complaint. Much has happened since 1978 to demonstrate the need for the exercise of this Court's original jurisdiction and the lack of any suitable alternative forum.

One factor strenuously urged by Texas as requiring denial of the prior motion was the provisional settlement agreement between the Estate and California. In that agreement, the Estate agreed to pay an 18% tax to California *if* this Court entertained the suit against Texas and found that Hughes was not domiciled in Texas. Texas protested that this agreement was collusive, that the agreement amounted to a "sale" of access to this Court's original jurisdiction, that California lacked clean hands, and that there was no genuine case or controversy. At oral argument, several Justices expressed concern over the possibility that, under the agreement, an 18% tax would be paid to California even if Nevada were found to be the domicile. That settlement agreement has now expired by its own terms, and the relationship between California and the Estate is now wholly adversary. Complaint ¶ 2(a). We fully expect that, if leave to file is granted, the controversy between all parties will be vigorously contested.

It was also urged in 1978 that the controversy was premature because the "lost will" claim of Howard Hughes Medical Institute and the validity of the so-called "Mormon Will" had not yet been determined. Texas argued that if the HHMI lost will claim were sustained, there would be no inheritance tax as the alleged will devised all assets to a charitable foundation. Similarly, the Mormon Will left substantial assets to charity, and Texas urged that the resulting deductions for charitable bequests would eliminate the risk that taxes would exceed the Estate's assets.

The Mormon Will was found to be not genuine following a trial by jury. No appeal was taken and the judgment is now final. Complaint ¶ 2(b). The HHMI lost will claim was also rejected by a final judgment of the Nevada Supreme court. Complaint ¶ 2(b). A Texas probate court has reached the same conclusion. *Id.*

From the concurring opinions, it appears that considerable weight was given the possibility that an alternative forum for the resolution of the conflicting tax claims might be available in a District Court under the Federal Interpleader Act. In the next section, we shall show that this expectation of the concurring Justices was mistaken. We shall also show that, even if jurisdiction could technically be established, the problem of venue makes the use of the Interpleader Act wholly unsuitable for adjudicating the rival tax claims of sovereign states. Then, in Part III, we will discuss Justice Stewart's argument—subscribed to by two other members of the Court—for the overruling of *Texas v. Florida.*

II.
THERE IS NO SUITABLE ALTERNATIVE FORUM.

Certain fundamental propositions will not be disputed.

First, California was not a party to the Texas proceedings and will not be bound by any determination of domicile made therein. *Texas v. Florida, supra*, at 411; *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). A Texas court has found that Hughes was a domiciliary of Texas and that Texas can impose its inheritance tax, but California will not be bound by that judgment.

Second, California is therefore free to determine, inconsistently with any Texas judgment, that Hughes died domiciled in California and to tax the Estate and heirs accordingly. *Nevin v. Martin*, 307 U.S. 615 (1939)(per curiam), *aff'g* 22 F. Supp. 836 (D.N.J. 1938). In that event, neither the Texas judgment nor the California judgment will be reviewable in this Court because no federal question is presented. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *Texas v. Florida, supra*, at 410-11.[5] Indeed, the Court has consistently refused to review

[5] The Court said in *Worcester County Trust Co. v. Riley, supra,* at 299-300:

"Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may

(footnote continued on following page)

inconsistent adjudications of domicile. *See, e.g.*, the denials of certiorari in *Estate of Dorrance*, 287 U.S. 660 (1932); 288 U.S. 617 (1933); and 298 U.S. 678 (1936).

Third, unless the Federal Interpleader Act provides an avenue of relief—a subject to which we will turn in a moment—the heirs and the estate are without remedy. They may not enjoin in federal court the collection of the tax by either state (*Hill v. Martin*, 296 U.S. 393 (per curiam), *aff'g* 12 F. Supp. 746 (D.N.J. 1935)) because, *inter alia*, of the anti-injunction rule of 28 U.S.C. §2283; *see also* 28 U.S.C. §1341. As already noted, inconsistent adjudications by the state courts are not reviewable in this Court on certiorari. Finally, the arbitration processes established by the Uniform Act on Interstate Arbitration of Death Taxes (*see* CAL. REV. & TAX. CODE §§14197-14197.13) and the alternative statutory arbitration procedure in force in several states (*see id.* §§14199-14199.13) are unavailable because Texas has not adopted either of those Acts. *See* CCH INHERITANCE, ESTATE & GIFT TAX REPORTER ¶12,035.

Fourth, neither state has any remedy against the other except by original suit in this Court. As just noted, the arbitration mechanism is unavailable because Texas has not adopted the Uniform Act or any comparable law providing for arbitration. Neither state can obtain jurisdiction over the other

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be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error [citations] or require that pronouncements shall be consistent, [citation]. Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries [citations]. Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States."

absent a voluntary appearance; beyond that, this Court's original jurisdiction over controversies between states is exclusive. 28 U.S.C. § 1251(a); *California v. Texas, supra*, 437 U.S. at 606 (Stewart, J., concurring).

Thus, one is brought to the suggestion of the concurring opinions in *California v. Texas* that relief might be had under the Federal Interpleader Act. The discussion in the opinions of Justice Brennan, Justice Stewart and Justice Powell all focused on the Eleventh Amendment issue arising from this Court's earlier holding in *Worcester County Trust Co. v. Riley, supra*, that such a suit under the Federal Interpleader Act was barred by the Eleventh Amendment. The concurring opinions argued that *Worcester County* had, in this respect, been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974).

The concurring opinions appear to have assumed that, if the Eleventh Amendment no longer barred an interpleader suit in a district court, subject-matter jurisdiction under the Federal Interpleader Act could be established. However, that issue was not briefed, was not discussed at oral argument, and was not considered in any of the opinions. In fact, the issue is far more difficult than the Court may have thought. It has been carefully explored in the aftermath of *California v. Texas*. Problems of jurisdiction and procedure which this Court could not possibly have envisioned have now surfaced.

It will be helpful, as a prelude to discussing these matters, to recount the procedural history of the litigation after the decision in *California v. Texas*.[6] Three weeks after that decision, the Estate filed the present action in the United States District Court for the Western District of Texas. Among those joined as defendants were the taxing officials of California and Texas.

California made two related motions in the fall of 1978. First, it asked the District Court to enter an order adding as

[6] *See also* Cert. Pet. at 3-6.

defendants some twenty-two persons whom the Estate has recognized as the heirs of Howard Hughes. Second, it asked the Court to transfer the action to a neutral forum—the District of Colorado—which all parties concede was *not* the domicile of Hughes. California urged that this case should not be heard in a forum whose residents have—through their interest in the treasury of their state's government—an interest in the outcome. Both of these motions were denied by the District Court in November, 1978. The venue motion was denied on the ground that transfer to a neutral forum could not be accomplished under the existing venue provisions of the Interpleader Act. *See* Cert. Pet. at 23-30; *see also* pp. 23-26, *infra*.

Following these rulings, California filed a Motion to Dismiss, which was heard in tandem with a previously filed motion by Texas. In July, 1979, the District Court issued an order granting the motions, finding that Plaintiff had not shown jurisdiction under the Federal Interpleader Act. *Lummis v. White*, 491 F. Supp. 5 (W.D. Tex. 1979). The court concluded that although Plaintiff's First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession *and* a "citizen of a state" for diversity purposes. (Although California and Texas are also "claimants", the District Court correctly held, in accordance with *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482(1894) that states are not "citizens of a state" for purposes of diversity jurisdiction.) The court thus held that the minimal diversity of citizenship required by Section 1335 was lacking. The Estate appealed from this order and California cross-appealed, contending that the District Court's denial of its motions to add parties and change venue was erroneous.

On appeal, the Court of Appeals reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying California's motions. *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980). The court held that the Texas Administrator of the Estate is also a "claimant" under the

interpleader statute, and that "the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under section 1335." *Id.* at 403. Since the Administrator's citizenship is diverse to that of the County Treasurer of Los Angeles, the Court held that interpleader jurisdiction was established. On the issues presented by California's cross-appeal, the Court held that joinder of the prospective heirs was unnecessary (*id.* at 403-04) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* at 399 n.5.

For reasons we shall now discuss, the matter cannot end there. The Federal Interpleader Act does not provide an alternative and adequate forum for the determination of this controversy.

A. As the Federal Interpleader Act Is Presently Framed, a District Court Does Not Have Subject-Matter Jurisdiction of a Multi-State Domicile Dispute.

Fatal jurisdictional defects preclude the Estate's use of the Federal Interpleader Act. At the heart of those problems is a statute plainly not designed for the purpose of resolving inconsistent death tax claims pressed by sovereign states. Its jurisdictional requirement is set forth in 28 U.S.C. §1335(a)(1):

> "The district court shall have original jurisdiction of any civil action . . . in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

The Interpleader Act thus requires that the plaintiff show (1) that there are at least two claimants to money or property in its "custody or possession"; and (2) that at least two of these claimants are "citizens of different states" under Section 1332, the federal diversity statute.

The jurisdictional problem arises because this Court has long held that a state is not a "citizen of a state" for diversity purposes. *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894). Likewise, suits against a state agency or official are deemed suits by or against a state, and thus are not within federal diversity jurisdiction. *Craig v. Southern Natural Gas Co.*, 125 F.2d 66, 67 (5th Cir. 1942)(suit by state tax collector against citizen of another state); *People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942)(same). Thus the taxing officials of California and Texas—who are indisputably "claimants"—are not "citizens" for diversity purposes and their presence does not support jurisdiction.

In *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980), the Fifth Circuit did not question these principles, which the District Court had applied in dismissing the action. However, it thought jurisdiction could be premised on two unique aspects of this case.

It first held that the Texas administrator, who had initiated the federal interpleader suit, was an "interested stakeholder" who was thus also a "claimant"; therefore, it concluded, the administrator's citizenship could be considered for purposes of establishing jurisdiction. In the Petition for Certiorari, we show why this decision is unsound and could work an unintended, radical expansion of federal jurisdiction. *See* Cert. Pet. at 15-18.

But whatever may be said of this conclusion, the second prong of jurisdiction found by the Court of Appeals has now been completely eradicated by subsequent events. The Court of Appeals initially held that the requirement of a second "claimant" of diverse citizenship to the Texas administrator was satisfied by the joinder of H. B. Alvord, the County Treasurer of Los Angeles County. Alvord's "claimant" status derived from a peculiar feature of California law by which the *state* inheritance tax was initially collected by the *county* treasurer, who retained

a small fraction of the tax as compensation for that administrative service and remitted the balance of the tax to the State Controller. *See* Cert. Pet. at 3 n.3. Because a *county* officer is a "citizen of a state" for diversity purposes (unlike a *state* officer), Alvord was deemed to satisfy the minimal diversity requirement of Section 1335. 629 F.2d at 403. Thus, although federal interpleader jurisdiction would not be present in controversies involving other states in which the death tax is paid to the state and not a county officer, this anomalous feature of California law was seized upon to save this one case from dismissal for want of jurisdiction.

After the time for petitioning for rehearing had expired, an extensive revision to the California inheritance tax law became effective. As explained in detail in the Petition for Certiorari, effective January 1, 1981 the county treasurer's peculiar role in tax collection was eliminated, and the entire inheritance tax is now to be paid directly to the State of California. A. B. 2092, Ch. 634, Cal. Stats. 1980.

This new legislation completely eliminated any interest Alvord may have had in the death tax claim of California against the Hughes Estate. Whatever may have been the case when the Court of Appeals rendered its original opinion, it is clear that Alvord is *not* now a "claimant" to any portion of the funds which are the subject of the federal interpleader action. In the language of the Act, he is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. 28 U.S.C. § 1335(a)(1). The State of California (and Mr. Cory, as its Controller) is the sole claimant of any inheritance tax due under the laws of California; of course, neither California nor Cory is a "citizen" of that State for purposes of federal diversity. Thus the jurisdictional requirement of Section 1335—that there be "two or more adverse claimants, of diverse citizenship as defined in Section 1332"—simply cannot be satisfied. The federal interpleader action suggested in the concurring opinions of *California v. Texas* thereby falters on a

ground neither briefed by the parties nor discussed in those opinions.[7] *See* Cert. Pet. at 18-23.

It is now clear, therefore, that the hope expressed in the concurring opinions that the Federal Interpleader Act might be an appropriate vehicle for resolving multi-state domicile disputes cannot be realized. The Court of Appeals' strained interpretation of the jurisdictional requirements of the Act could, at best, have served to create a special basis for jurisdiction applicable to the Howard Hughes case; absent the peculiar feature of the former law of California which gave the country treasurer a small interest in the matter, a dispute between two or more states over domicile could not be heard in a federal district court under the Interpleader Act because states are not "citizens" of states for diversity purposes. At best, therefore, the original solution of the Court of Appeals was applicable only in the unique circumstances of this case (and then only so long as the law of California remained unchanged until January 1, 1981). In any future dispute of this kind, including controversies involving the State of California, jurisdiction under the Interpleader Act will not be available. And, because of the change in California law eliminating Alvord's "claimant" status, the Interpleader Act cannot even be used to resolve the immediate controversy.

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[7] The Court of Appeals declined to grant leave to file a petition for rehearing out of time in order that this subsequent development might be considered. The Petition for Certiorari provides a vehicle by which this Court could either address the question in the first instance or remand to the Court of Appeals for reconsideration in light of this subsequent legislative development affecting jurisdiction. Failing that, California will be obliged to raise the loss of jurisdiction in the District Court, which will have no alternative but to dismiss the interpleader action.

B. An Interpleader Suit Brought by an Estate To Settle the Inconsistent Death Tax Claims of Two or More "States" Is a "Controvers[y] Between Two or More States" Under 28 U.S.C. §1251(a) and Is Within the Original and Exclusive Jurisdiction of the Supreme Court.

Section 1251(a) of the Judicial Code gives this Court "original *and exclusive* jurisdiction of *all* controversies between two or more States." (Emphasis added). This grant of exclusive jurisdiction prohibits all other courts from adjudicating disputes between states. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n,* 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz,* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959). Even if the Federal Interpleader Act otherwise could be read to cover the present case, if the action involves a "controvers[y] between two or more States", Section 1251(a) precludes any federal district court from entertaining the action, for the specific jurisdictional statute—in this case, the one which reserves controversies between states to this Court—controls over the general. *Preiser v. Rodriguez,* 411 U.S. 475, 489 (1973).

There can be little doubt that the statutory interpleader action instituted by the Estate results in a "controvers[y] between two or more States. The object of the suit is to resolve the conflicting tax claims of two states, California and Texas. Under the law of each state, a citizen has but one domicile. It follows that, if one state wins, the other must lose. Interpleader thus locks the competing states—who previously were free to proceed in their own courts and to impose death taxes without regard to the actions of the other state—in an adversarial position. It thus creates a controversy between states of the most concrete kind.[8] Under Section 1251(a), such an adjudication can only occur in this Court.

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[8] Justice Stewart's concurring opinion in *California v. Texas, supra,* states that the real controversy in cases of this kind is between each taxing state and the estate, not between the states themselves.

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C. Because Under the Interpleader Act Venue Must Be Laid in One or the Other of the Claimant States, Statutory Interpleader Is an Unsuitable Means to Resolve Multi-State Domicile Disputes.

The jurisdictional problems discussed above are not the only drawbacks to the proposed resort to the Federal Interpleader Act. Following the decision in *California v. Texas*, the attempted use of federal statutory interpleader by the Estate has revealed another critical aspect of the Act rendering it wholly unsuitable for the resolution of multi-state domicile disputes.

Section 1397 of the Act authorizes venue of a statutory interpleader suit in any district "in which one or more of the claimants reside." The claimants, of course, are the state taxing officials seeking to collect a death tax. Thus in *Lummis v. White*, venue was laid in the Western District of Texas, the district in which the Texas taxing officials reside. Alternatively, of course, suit could have been brought in the Eastern District of California, in which the California Controller resides. Venue could not be changed under 28 U.S.C. §1404(a) to any other district because that provision allows transfer only to a district

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437 U.S. at 611-12. Whatever the merits of this view *before* the invocation of an interpleader action (*see* Part III, *infra*), it surely cannot be the case *after* the court orders the claimants to contest their claims before it. Once that occurs, the states will necessarily be combatants vis-a-vis each other, since their claims are mutually inconsistent and both cannot prevail.

Nor does the fact that the interstate controversy arises only in the "second stage" of the interpleader action (i.e., when the interpleader claimants are compelled to litigate their claims against one another) remove the jurisdictional bar against hearing such cases in a federal district court. The grant of exclusive jurisdiction to this Court prohibits other forums from entertaining "all" interstate controversies, regardless of the stage in the proceedings when they arise. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974)(motion to intervene partially denied where grant would create interstate controversy and oust the district court of jurisdiction).

in which the action "might have been brought." *See Hoffman v. Blaski,* 363 U.S. 335 (1960).[9]

The result is that conflicting state tax claims under the Interpleader Act will be tried in a court—and very likely before a jury[10]—sitting in one or the other of the contending states. In this case, were the Federal Interpleader suit to go forward, the rival tax claims of the State of California and the State of Texas would be tried in the Western District of Texas, probably before a jury of Texas citizens. And the choice of venue is that of the stakeholder, who is free to pick the state with the lowest death tax rate, which is precisely what the Hughes Estate did in this case.

The essence of an interpleader suit to determine which of two states' domicile-based death tax claim is valid is that it is a controversy between two states. Whether or not such a suit in a District Court is, as we have urged (*see* p. 21, *supra*), foreclosed by this Court's exclusive jurisdiction over "controversies between two or more States" (28 U.S.C. §1251(a)), compelling one state to litigate its claim before a jury composed of citizens of the rival claimant state is unseemly and inappropriate. Such a forum—even if technically available—is not an adequate and fitting alternative forum in which California should be compelled to litigate its death tax claim. This is so for several reasons.

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[9] As we have said, California sought, in the District Court and the Court of Appeals, an order requiring the joinder of the acknowledged heirs of Hughes as additional "claimants". The District Court and Court of Appeals held that the heirs need not be joined because their interests were fully represented by the Texas administrator, a real party in interest under Rule 17. *See* 629 F.2d at 403-04. Had the heirs been joined, a change of venue under Section 1404(a) would have been possible, for as additional claimants their various residences could have been considered for venue purposes under Section 1397. Having declined to order the joinder of the heirs, the District Court ruled that transfer to a neutral forum was precluded by Section 1404(a), and the Court of Appeals affirmed. *Id.* at 399 n.5. The Petition for Certiorari seeks review of those rulings; but unless they are corrected, the statements in the text above correctly state the limited choices of venue available in a case such as this one.

[10] It is very probable that, in suits of this kind, any party can demand a trial by jury. *See* Cert. Pet. at 13 n.13.

First, the delicate nature of the adjudication is indisputable. In the proceedings to date, litigation of the state tax claims in the courts of California and Texas has been enjoined. The collection of taxes has been restrained. And two sovereign states are being asked to contest their conflicting tax claims in a single proceeding in a federal trial court.

Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971)(cataloguing reasons behind grant of original jurisdiction for suits between states and citizens of other states).[11] That reluctance should be greatly intensified where, as in this case, the dispute is between two states, and the tribunal sits in one of them. California should not have to litigate its dispute with Texas before a jury of Texas citizens.

Second, as the Interpleader Act presently is written, the finders of fact in a statutory interpleader action will necessarily have a pecuniary interest in the outcome because the suit must be brought in one or the other of the claimant states. In this case, because of the size of the Hughes Estate, that interest is not *de minimus. See* Cert. Pet. at 25-26.

The jurors' personal stake in the controversy alone makes a trial by jury in one or the other of the claimant states inappropriate. Indeed, where there is an alternative forum in this Court, proceeding before jurors of one claimant state deprives the other state of the disinterested trier of fact which due process of law requires.[12] *Cf. Tumey v. Ohio,* 273 U.S. 510

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[11] *See also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288 (1888); *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419, 475-76 (1793); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1681 (4th ed. 1873)(reasons for exclusive jurisdiction of Supreme Court over interstate controversies).

[12] In the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases

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(1927)(village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) (invalidating conviction by mayor's court whereby mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia,* 429 U.S. 245 (1977)($5 fee for issuing search warrant disqualifies magistrate).[13]

Third, cases of this kind, if tried before a jury drawn from a claimant state's citizens, could be adversely affected by parochial feelings of regional pride. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent—that is, where the decedent felt his "home" was. This subjective determination inherently would be open to the risk that jurors would—despite instructions to the contrary—use their personal feelings about their home state as a guide to divining the feelings of the decedent.

Fourth, and of critical importance, a trial before a jury of citizens of one of the two claimant states simply cannot satisfy the imperative that justice not only be done, but appear to be done. For example, were the present controversy to be resolved in Austin (or, for that matter, in Sacramento) with a finding

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are improper, *see, e.g., Epperson v. United States,* 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

[13] Of course, where the only fact-finders available to resolve a dispute all have a direct or indirect interest in the outcome, the "rule of necessity" applies and the case will be decided by the available judges or jurors. *Evans v. Gore,* 253 U.S. 245 (1920); *United States v. Will,*—U.S.—, 49 U.S.L.W. 4045 (1980).

that the decedent was a domiciliary of the forum state, suspicion would inevitably be created that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done in an Austin trial in which a Texas domicile was found. That potential for bitterness and suspicion is exacerbated because the choice of forum under Section 1397 is the Estate's, which has within its power to select the forum with the lowest rate of death tax.

III.

TEXAS V. FLORIDA SHOULD NOT BE OVERRULED.

Three Justices of this Court have suggested that *Texas v. Florida, supra,* should be overruled. *California v. Texas, supra,* 437 U.S. at 602 (Stewart, J., concurring). For reasons already discussed, and others which follow, we respectfully suggest that *Texas v. Florida* was rightly decided, and should be applied to this indistinguishable case. Indeed, as we shall show, *Texas v. Florida* was not a distortion or misapplication of equitable principles; rather, it applied "accepted doctrines of . . . equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court." *California v. Texas, supra,* at 615 n.15 (Stewart, J.), quoting from *Texas v. Florida, supra,* 306 U.S. at 405.

Justice Stewart stated that "what is involved is unfairness to the *estate,* not to the taxing States" and that to the extent the purpose of the action is "to prevent the possibility that the estate will be subjected to double taxation, it does not present a dispute between two States within the original and exclusive jurisdiction of this Court." *Id.* at 611-12 (emphasis in original). Rather, "[t]he real dispute arises solely from the risk that one of the States will be left with an entirely valid but uncollectible tax judgment." *Id.* at 612. This, Justice Stewart argues, would be true even if "the two States were staking their tax claims to

the finite assets of the estate on entirely different grounds" in which case "the question of domicile would be irrelevant . . . ." *Id.* at 612-13. This risk of conflict, which Justice Stewart acknowledged "poses a sufficiently real threat to the estate" to justify an interpleader suit in a district court, "does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another." *Id.* at 614.

Perhaps the proposed Complaint in the prior application failed sufficiently to demonstrate the injury to California which the rival Texas tax claim causes. That Texas claim has now been reduced to a judgment. Many of the collateral issues such as the HHMI "lost will" claim and the "Mormon Will" claim have now been swept away. *See* pp. 12-13, *supra.* Whatever may be said of the prior application, we firmly believe that the proposed Complaint tendered herewith leaves no doubt that the Texas judgment poses a real, and present, threat to the rights of California.

In the first place, it is *not* true that "the conflict would be equally real if the two States were staking their tax claims to the finite assets of the estate on entirely different grounds." While the economic injury might be indistinguishable, the *legal underpinnings* of the conflict would not be. The laws of both California and Texas require a finding of domicile as a predicate of taxation, and both state's laws utilize an identical definition of "domicile." Complaint ¶23. Under the laws of California and of Texas, there can be but one domicile at any one time. *Id.* Thus there is more to this controversy than insufficient funds: California alleges that Texas is injuring its interest because Texas has pressed a claim, and secured a jury verdict, that is without legal and factual basis and which is wholly inconsistent with the rival claim of California. Complaint ¶¶23-24. In other words, under the laws of both California and Texas, the right to impose the asserted death tax depends upon establishing Hughes' domicile at the date of his death. If Texas is entitled to impose the tax, California is not; if California is entitled to tax this estate on the basis of domicile,

Texas is not. As a result, "the question of domicile" is not "irrelevant." It lies at the heart of the dispute between California and Texas.[14]

Justice Stewart nevertheless argued that "[t]he *injury* would be the same whatever the source of each State's claim upon the debtor." 437 U.S. at 615 n.15. While the resultant *injury*—the inability to collect a judgment for death taxes—might be the same in both instances, there are two critical differences. First, the *cause* of that injury in this case is, according to the allegations of the Complaint, that Texas seeks to collect a tax which is owed to California, not to Texas. In contrast, in the circumstances posited by Justice Stewart—unrelated claims against a debtor with insufficient funds—the cause of the injury would be the debtor's insufficient funds, and not some deficiency in the rival's claim. Were Texas seeking to recover from the estate upon an unrelated tort or contract claim, California might well have no legal basis for seeking relief, for the insufficiency of the assets alone arguably provides no legal basis for one creditor to seek relief against another.

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[14] Justice Stewart suggested that if this Court were to entertain the original suit, it might apply a federal law rule of decision other than the state law of domicile. Even were that so, the substantive rule of law this Court might hereafter apply has no bearing on the threshold question of whether, at present, there exists a controversy between the two states. Moreover, the assumption that the Court would invariably fashion a federal common law rule is unfounded. In original jurisdiction cases, the Court "appl[ies] federal law, *state law*, and international law as the exigencies of the particular case demand." *Kansas v. Colorado,* 185 U.S. 125, 147 (1902) (emphasis added). Here, there is no "conflict" of state laws, as the law of Texas and the law of California as respects the basis for taxation and the definition of domicile are identical. In such circumstances, though the Court has the power to disregard the substantive law shared by the contending states, it has previously chosen to apply the law of the states as the rule of decision. *See Wyoming v. Colorado,* 259 U.S. 419, 470 (1922). That, of course, was the approach taken in *Texas v. Florida, supra. See* 306 U.S. at 413-14, 424-27.

The second point of distinction is that both Texas and California claim to be more than unsecured creditors seeking payment from a limited fund; each state claims, under its own laws, to have a lien on the assets of the estate to secure payment of the taxes owed to it. This lien is a property right of obvious value and importance. The proposed Complaint asserts that the Texas lien on intangibles is invalid because Hughes was not domiciled in Texas. Complaint ¶24. It seeks relief, in the nature of removing a cloud on California's title to its lien, to protect California's security interest in the estate's assets. This form of relief is well known in courts of equity. *See generally* POMEROY'S EQUITY JURISPRUDENCE §§ 248-49, 1393-94 (5th ed. 1941).

Justice Stewart's opinion acknowledges that "the risk of conflict [between the California and Texas tax claims] poses a sufficiently real threat to the estate to present a ripe controversy if an interpleader suit were filed by the appropriate parties in a federal district court," but argues that this "risk certainly does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another." *Id.* at 614. It is difficult to understand how the "case or controversy" standard can be satisfied by a statutory interpleader action brought in a district court but not satisfied if the form of the action adheres to the mode of *Texas v. Florida.* In both instances, injury is done to *both* the Estate *and* to California by the assertion of the assertedly invalid Texas death tax claim.[15] And if this Court accepts jurisdiction of the case

[15] As we have already pointed out (*see* pp. 21-22, *supra*), while a statutory interpleader suit is commenced by the stakeholder, once the deposit of the fund is accepted and jurisdiction accepted the controversy becomes one between the claimants. Thus *Lummis v. White* is now, in form and substance, a "controvers[y] between two or more States" (28 U.S.C. §1251(a)) within the exclusive jurisdiction of this Court. Were that case to go forward, if California were to prevail, Texas would lose; conversely, a finding of Texas domicile would mean that California could not collect its claimed tax. California and Texas are, in every sense of the word, adversaries.

and renders a judgment finding a California domicile, California would be afforded a concrete, tangible benefit: an authoritative and enforceable declaration that it, and not Texas, is entitled to impose a domicile-based death tax. and that its lien, and not the lien of Texas, is a valid one.

The contrary view of the concurring opinion appears to rest upon the belief that under " 'accepted doctrines of . . . equity systems of jurisprudence' " (437 U.S. at 601 n.15, quoting from *Texas v. Florida, supra,* 306 U.S. at 405), a *stakeholder* could seek relief from two or more inconsistent claims by interpleading the claimants but that such a *claimant* could not obtain relief by bringing a bill in equity directly against the rival claimant. Justice Stewart's opinion acknowledges, as the Court held in *Texas v. Florida,* that the availability of a particular form of relief under accepted principles of equity jurisprudence is a " 'guide[ ] to decision of cases within the original jurisdiction of the Court.' " *Id.* But contrary to the concurring opinion's assumption, relief by one creditor from the inconsistent claim of another *is* a familiar form of equitable remedy which this court has frequently acknowledged and applied.

Pacific National Bank v. Mixter, 124 U.S. 721 (1888) is an early recognition of the equitable principles later applied in *Texas v. Florida.* In that case, creditors of a national bank obtained a writ of attachment. Two sureties issued a bond for the dissolution of the attachment, which obligated the sureties to the creditors and allowed the attachment to be dissolved. To obtain the bond, the bank deposited with the sureties certain negotiable bonds. Later, the bank failed and a receiver was appointed. The receiver contended that as the bank was a national bank, the original attachment was void; therefore, it argued, the sureties had no liability to the creditors on the surety bond and should return the negotiable bonds to the receiver. The surety, which was faced with the inconsistent assertions of the receiver and the attaching creditors (who, of course, did not concede that their prior attachment was invalid), refused to return the negotiable bonds.

The receiver filed a "bill in equity" (124 U.S. at 723) directly against the attaching creditors as well as against the sureties. In opposition, it was urged that such relief was not available in equity. The Court disagreed:

> "Objection is made to the relief which is sought in equity, because if the attachment bonds are void there is an adequate remedy at law in the suits that may be brought for their enforcement. If the suit in equity had been brought by the sureties to get rid of their obligation, this objection might be good; but such is not its character. The sureties have in their hands assets of the Bank which the Receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds. The Receiver says there is no liability, because the bonds are invalid; and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them. Such a suit is clearly cognizable in equity. *The sureties are in a sense stakeholders.* They do not claim the securities unless they are liable on the bonds; and the suit, although not brought by them, is in the nature of an interpleader to save them 'from the vexation of two proceedings on a matter which may be settled in a single suit.' The decree will bind all alike, and if the sureties are held not to be liable it will conclude the creditors from all further proceedings against them on the bonds, and leave them free to surrender the securities to the Receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the Receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets on the Bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void the judgments are inoperative as a basis of recovery upon the bonds. (*Id.* at 729-30 (emphasis added)).

Had the sureties, whom the Court viewed as in the position of stakeholders, brought the suit, it would have fit the standard interpleader mode. But, as in the present case and in *Texas v. Florida,* the action was brought by one creditor directly against the rival creditors.

Equitable relief against a rival creditor was also allowed in *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924). There a stakeholder held a fund which had been assigned by its predecessor to two different parties, each of which claimed the fund. The stakeholder did not institute an interpleader suit. Instead, one of the claimant assignees sued the other. This Court allowed the action, held that the joinder of the stakeholder was not required,[16] and determined which of the assignee claimants was entitled to prevail over the other.

More recently, the Court has applied this equitable principle in exercise of its own original jurisdiction. In *Pennsylvania v. New York,* 407 U.S. 206 (1972) and *Texas v. New Jersey,* 379 U.S. 674 (1965), actions in equity were allowed to settle the claims of rival states which each sought to escheat funds held by a stakeholder.

All of these cases afford equitable relief to a creditor whose interests are impaired by the presence of a rival and inconsistent claim of another. While the debtor in such situations is doubtless a stakeholder who could file an interpleader, the creditor need not await such an action but may proceed in equity directly against the other creditor. Accordingly, under "accepted doctrines of . . . equity systems of jurisprudence", relief in the circumstances of this case *is* available, and the case or controversy standard is necessarily satisfied.

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[16] The stakeholder was initially joined. However, jurisdiction was based on diversity of citizenship, and the stakeholder was a citizen of the same state as plaintiff. The Court held that the stakeholder was an "unnecessary and dispensable party" (*id.* at 190) and disregarded its citizenship.

For similar reasons, it is difficult to understand how this controversy could be sufficiently "ripe" for adjudication as a statutory interpleader in a district court but not for adjudication in exercise of this Court's original jurisdiction. In fact, the controversy is ripe for adjudication in either context. It is true, of course, that only Texas has secured a trial court judgment; California has been restrained since the filing of the statutory interpleader action from proceeding in its own courts. But it has long been clear that the mere assertion (or even the theoretical presence) of inconsistent claims, especially claims exceeding the available assets of the debtor, is sufficient to permit a federal court to exercise jurisdiction in an interpleader case. *See, e.g., State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967); 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL §1704 (1972). In *State Farm,* an interpleader suit was brought by an insurer fearing multiple tort judgments in excess of the policy limits, before any of the tort cases had come to trial. *See* 386 U.S. at 525. The Court expressly rejected the suggestion that the action could not be brought until some or all of the tort claims were reduced to judgment. *Id.* at 531-33. No different considerations apply when the suit is brought by one claimant directly against the other. Indeed, the Court's observations in *State Farm* are equally applicable to an action in equity brought by one of the rival claimants:

> "Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment poses for the insurer, *and the unfairness which may result to some claimants,* were among the principal evils the interpleader device was intended to remedy." (*Id.* at 533 (emphasis added)).

The finding in *Texas v. Florida* of a controversy sufficiently ripe for adjudication is also consistent with this Court's original

jurisdiction precedents. For example, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court confirmed that its original jurisdiction was properly exercised, and denied a motion to dismiss on the ground that a sufficiently ripe controversy was not presented. In that case, the Court adjudicated inconsistent water rights claims to the North Platte River. The motion to dismiss urged that to date there had been sufficient water for the three claimant states and that, hence, the threat of potential future injury was an insufficient basis for jurisdiction. The Court held that because the three states made *claims of entitlement* which exceeded the projected available water, there was jurisdiction even though no actual shortage of water had ever occurred:

> "[W]here there is not enough water in the river to satisfy the *claims asserted* against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." (*Id.* at 610 (emphasis added)).

The Court also found the mere existence of untested, unadjudicated rival state claims create an immediate, justiciable controversy in *Pennsylvania v. New York*, 407 U.S. 206 (1972) and *Texas v. New Jersey*, 379 U.S. 674 (1965). In both of those cases, a state seeking to escheat abandoned funds was allowed to invoke this Court's original jurisdiction because of the possibility that other states would also seek to escheat the same funds. This was so even though no rival state had obtained a *judgment* escheating the same funds. It could well have been argued in those cases, as was suggested by Justice Stewart in *California v. Texas*, that no ripe controversy would be presented until at least two states secured final judgments escheating the same property. Indeed, in those cases there was reason to believe that multiple judgments of escheat would *not* occur.[17] Nevertheless, the Court did not take that course.

[17] The possibility of accommodation between the states was far from inconceivable. In *Western Union Telegraph Co. v. Pennsylvania*,

(footnote continued on following page)

Despite the possibility that the potential problem of inconsistent judgments might be avoided by state restraint or deference to a foreign judgment, the Court allowed the exercise of its original jurisdiction merely because one state's claim was rivaled by the "actual, active and persistent" claim (*Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. at 76 (1961)) of another state.

From the foregoing it follows that the suggestion that *Texas v. Florida* be overruled is in reality an argument that this Court should also repudiate the equitable principles applied in *Pacific National Bank v. Mixter, supra,* in *Salem Trust Co. v. Manufacturers' Finance Co., supra,* in *Nebraska v. Wyoming, supra,* in *Pennsylvania v. New York, supra* and in *Texas v. New Jersey, supra.*

Texas v. Florida should not be overruled. While it may result in the occasional imposition upon the limited resources of this Court, unless and until Congress passes a statute which properly creates an alternative forum,[18] this Court's original jurisdiction provides the only appropriate avenue of relief from an intolerable situation. No one can defend the unfairness, to say nothing of the inefficiency, of multiple assertions of domicile being adjudicated in separate state court proceedings. No one can defend the imposition of inheritance taxes by two or more states, each on the basis of domicile, with the total taxes exceeding the assets of the estate.

(footnote continued from previous page)

368 U.S. 71 (1961), the predecessor of the escheat cases discussed above, the Court noted that New York had obtained a judgment escheating certain funds, following which the Pennsylvania court declared that it could not exercise escheat jurisdiction over the funds already taken by New York. *Id.* at 77. Thus under Pennsylvania law, multiple judgments of escheat could not occur. If the other states took the same view, there would never have been a situation in which the stakeholder was subjected to multiple liability. Nevertheless, the Court opened its doors to suits under its original jurisdiction despite the possibility that the controversy might be resolved short of inconsistent judgments of escheat.

[18] Congress could, of course, provide for an interpleader remedy in a district court. Such a proceeding would have to be an express exception to this Court's original jurisdiction under 28 U.S.C.

(footnote continued on following page)

For the reasons discussed above (*see* pp. 17-26, *supra*), an action under the present Federal Interpleader Act does not provide an appropriate solution. By its own terms, subject matter jurisdiction will be lacking in cases of this kind. But even if that were not so, the Act is an unsuitable remedy for resolving rival State death tax claims. As presently worded, venue must be laid in one or the other of the claimant states—and the choice of which state will be at the option of the stakeholder. Thus the tax claim of one state will be determined by jurors who are citizens of the rival claimant state. Moreover, once such an interpleader proceeding is commenced it becomes, by definition, a "controvers[y] between two or more States" which, under Section 1251(a), *only* this Court has jurisdiction to hear.

Of course, if every state were to adopt the Uniform Act on Interstate Arbitration of Death Taxes or otherwise consented to binding arbitration, the problem could be resolved in another way. California has adopted the Uniform Act. *See* p. 14, *supra*. The problem presented by this case is fortunately rare, doubtless because many states have adopted arbitration procedures such as those presented by the Uniform Act. *See California v. Texas, supra,* 437 U.S. at 615 n.15 (Stewart, J.). Unfortunately, Texas has not seen fit to do so. Were this Court to overrule *Texas v. Florida,* the resulting absence of any remedy against inconsistent state domicile claims would reward those states, such as Texas, who have abjured any participation in a fair process for the unitary resolution of these conflicting claims. Conversely, adherence to the rule of *Texas v. Florida* would encourage other states voluntarily to adopt such procedures.

For these reasons, we believe that the exercise of original jurisdiction to resolve this controversy is required. Under the

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§ 1251(a). *See* Part II(B), *supra*. By drafting a statute expressly designed for the purpose of resolving death tax disputes involving several states, the jurisdictional problems discussed in Part II(A), *supra*, could be avoided. Finally, Congress could provide for a neutral forum. Merely to recite these features of an appropriate new statute is to underscore the need for the exercise of original jurisdiction in the absence of one.

Constitution, and the statutes of the United States as they presently read, this Court is not only the appropriate forum, but the only possible one, for the proper determination of the rights of California and Texas.

CONCLUSION

The motion for leave to file complaint should be granted.

March 12, 1981.

Respectfully,

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No. , Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
Plaintiff,

VS.

STATE OF TEXAS, *et al.*,
Defendants.

COMPLAINT

Plaintiff, appearing through its duly authorized representative, Kenneth Cory, Controller of the State of California, alleges:

I.
JURISDICTION

1. This is a controversy between two states within the Court's original and exclusive jurisdiction under Article III, Section 2 of the Constitution and 28 U.S.C. § 1251(a). The

controversy exists because the State of California ("California") and the State of Texas ("Texas") each seek in the courts of their respective states to impose death taxes on the estate of Howard Robard Hughes, Jr. ("the Estate"), based upon assertions of California and Texas domicile. Each state claims a lien on the assets of the estate. Should both states be successful in their respective courts, the resulting judgments for taxes and interest, plus the federal estate tax, the expenses of administration and other lawful liabilities of the Estate will exceed the available assets of the Estate. Further, the assertion of liens by each state is inconsistent with the other state's asserted lien. As neither California nor Texas has appeared or will appear voluntarily in each other's courts and because this Court has exclusive jurisdiction over controversies between states, this Court offers the only available (and in any event the only appropriate) forum to achieve a resolution of the domicile issue which will be binding on all parties and ensure that the state to which the tax is properly due will be able to collect it.

2. In 1978, this Court denied a motion for leave to file a similar complaint. *California v. Texas*, 437 U.S. 601 (1978). Several factors asserted in opposition to the exercise of original jurisdiction, and which may well have impelled the Court to deny the motion, are no longer present:

(a) The Estate and California had entered into a provisional settlement agreement. In that agreement, the Estate agreed to pay a 16% tax to California if this Court entertained California's suit against Texas and found that Hughes was not domiciled in Texas. Texas protested that this settlement was collusive, that it amounted to a "sale" of access to this Court's original jurisdiction, that California lacked clean hands and that there was no genuine case or controversy between California and Texas. That settlement agreement has now expired by its own terms, and the relationship between California and the Estate is wholly adversary.

(b) In 1978, there was pending in various state courts a claim by the Howard Hughes Medical Institute ("HHMI") that a "lost will" of Hughes bequeathed his entire estate to a charitable foundation. Noah Dietrich's claim that the so-called "Mormon will" (which also purported to make substantial charitable bequests) was a valid testamentary instrument was also pending at that time. Texas urged in opposition to the prior motion for leave to file a complaint that if the HHMI lost will claim were sustained, the death tax controversy would be moot because the charitable bequest would foreclose any state claim for inheritance tax. It was also urged that if the Mormon will were found to be genuine, the death tax controversy would be eliminated because the resulting charitable bequests would so reduce the total taxes that the available assets of the Estate would not be exceeded by the total tax claims. Since this Court's prior order, these issues have now been adjudicated. The Mormon will was determined to be inauthentic. No appeal was taken and that judgment is now final. The HHMI lost will claim was rejected by a Texas probate court and by a final judgment of the Nevada Supreme Court.

(c) Four Justices of this Court previously suggested that the conflicting claim of California and Texas could be resolved in a United States District Court under the Federal Interpleader Act. Their concurring opinions in *California v. Texas, supra*, concluded that the Eleventh Amendment no longer barred such an action; they did not, however, discuss issues of subject matter jurisdiction and venue under the Interpleader Act. In light of subsequent events, those issues have proven to be formidable obstacles to the use of the Interpleader Act as an alternative means of resolving multistate death tax disputes. As more fully explained in paragraph 24 hereafter, a statutory interpleader action in a district court is not an available and appropriate alternative forum for the resolution of this controversy.

II.
PARTIES

3. Plaintiff California and Defendant Texas are both states of the United States of America. Each state maintains, and has maintained at all relevant times herein, a system of inheritance taxation whereby statutory liens on the right of succession are imposed on real and tangible personal property located within its borders and the intangible personalty, wherever situated, of persons domiciled within each state. The responsible authorities in each state are claiming, in good faith, that Hughes was domiciled therein at the time of his death and have taken steps to impose a tax on all the assets of the Estate within their taxing jurisdiction, including the intangible assets which constitute the overwhelming majority of the Estate's assets. In each state, the personal representative of the Estate is contesting the state's claim, asserting that Hughes died domiciled in Nevada, the only state in the nation without death taxes. Both California and Texas compute their inheritance taxes on the basis of the fair market value of the estate's assets at the time of the decedent's death and both maintain a "pick-up tax" to ensure that the state at least receives the maximum amount allowable as a federal tax credit for state death taxes paid.

4. Defendant Mark White is the Attorney General of Texas. Defendant Bob Bullock is the Comptroller of Public Accounts of Texas. Each of these officials is charged by law with the duty of enforcing the tax laws of Texas.

5. Defendant William R. Lummis has been appointed Temporary Administrator of the Estate by Probate Court No. 2, Harris County, Texas. Defendant Lummis has also been appointed Ancillary Administrator of the Estate by the probate court of Delaware, Provisional Administrator of the Estate by the probate court of Louisiana and Co-Special Administrator of the Estate by the Eighth Judicial District Court of the State of Nevada, County of Clark.

6. Defendant First National Bank of Nevada, a national banking association, has been appointed Co-Special Administrator of the Estate (with defendant Lummis) by the Eighth Judicial District Court of the State of Nevada, County of Clark. Defendant Richard Gano has been appointed Executor of the Estate by the Superior Court of the State of California, County of Los Angeles.

7. Defendants William Rice Lummis, Richard Gano, Howard Hughes Gano, Doris Gano Wallace, Annette Gano Gragg, Janet Houstoun Davis, Aileen Lummis Russell, Annette Gano Lummis Neff, Frederick Rice Lummis, and Sarah Houstoun Lindsey are first cousins of decedent Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate. Defendant Southern National Bank of Houston is the Independent Executor of the Estate of James Patrick Houstoun, Jr., first cousin of Hughes whom Hughes predeceased. Under the law of Texas, the Estate of James Patrick Houstoun, Jr., may be entitled to share in the Estate. Defendant Mrs. William Kent Gano is the Executrix of the Estate of William Kent Gano, first cousin of Hughes whom Hughes predeceased. Under the law of Texas, the Estate of William Kent Gano may be entitled to share in the Estate.

8. Defendants John McIntosh Houstoun, Margot Fleming Houstoun, James Wilkin Houstoun, Richard Alexander Houstoun, Barbara Cameron, Elspeth DePould and Agnes Roberts are first cousins, once removed, of Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate.

9. Defendant Avis Hughes McIntyre claims to be an equitably adopted first cousin of Hughes. Defendant Norton Bond is the executor of the Estate of Rush Hughes, who is claimed to be an equitably adopted first counsin of Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate.

10. Defendant George Neff is the Executor of the Estate of Annette Gano Lummis, the maternal aunt of Hughes. He claims that Hughes died intestate and that the estate of Annette Gano Lummis is entitled to share in the assets of the Estate.

11. An agreement between the parties named in paragraphs 7-10 ("the heirs") has been entered whereby the heirs agree as to the distribution of the assets of the Estate without regard to the laws of intestate succession of the various jurisdictions in which Hughes may have been domiciled. Were it not for the agreement, if Hughes dies intestate and a domiciliary of California, then under the law of California, the Estate of Annette Gano Lummis would inherit the entire Estate. As required by California law, the California inheritance tax has been computed without regard to the agreement, and Annette Gano Lummis will be liable for the entire California tax due (except as to certain real property validly disclaimed by her). However, the other heirs who are parties to the agreement will, to the extent that they inherit property pursuant to said agreement, be jointly and severally liable for their proportionate share of the California tax relating to the assets so acquired by them.

12. Defendant Summa Corporation is a Delaware corporation, the stock of which was solely owned by decedent at the time of his death. The Summa shares constitute a principal asset of the Estate. Summa has instituted an interpleader action in the Delaware courts between the various claimants to the Estate, seeking cancellation of decedent's shares and a judicial determination of their ownership.

III.
FACTUAL BACKGROUND

13. Howard Robard Hughes, Jr., was born in Texas in 1905. He resided in Texas until 1926, when he became a California domiciliary. He resided in California continuously until 1966 and acquired extensive business holdings and relationships there. Hughes filed non-resident income tax returns in California but paid tax at the resident rate (i.e., on all his income). His only known extended absence from California during this forty-year period was in 1953-54, when he temporarily resided in Nevada. After leaving California in 1966, Hughes travelled successively to Boston, Las Vegas, the Bahamas, Nicaragua, Canada, Florida, London, the Bahamas and

Mexico, living in hotel rooms in the various locales but never acquiring another domicile. During this period, decedent retained his personal and business ties to California and the "nerve center" of his business operations remained there. Hughes died on April 5, 1976, in an airplane en route to Houston, Texas.

IV.
PRIOR PROCEEDINGS

14. On April 14, 1976, nine days after Hughes' death, probate proceedings were opened by representatives of the Estate in the courts of Texas, Nevada and California. Annette Gano Lummis and William Lummis were appointed Co-Temporary Administrators of the Estate by Probate Court No. 2 of Harris County, Texas, while the nominees of Mrs. Lummis, First National Bank of Nevada and Richard C. Gano, were appointed Special Administrators of the Estate by the probate courts of Nevada and California, respectively. Subsequently, William R. Lummis was added as a Co-Special Administrator in the Nevada proceedings. Mrs. Lummis has since died.

15. On June 10, 1976, the State of Texas filed an appearance in the Texas probate proceedings, contending, *inter alia*, that Hughes was a Texas domiciliary at the time of his death and asserting its statutory inheritance tax lien against all assets within the Texas jurisdiction, including intangibles. The Texas Co-Temporary Administrators of the estate resisted Texas' claims and asserted that Hughes acquired first a California and then a Nevada domicile. After a jury trial, a verdict was returned finding that Hughes was a domiciliary of Texas. Determination of the amount of tax was left to a separate proceeding. An appeal has been taken by the Estate, but appellate proceedings have been stayed as a result of the federal interpleader suit described below. California is not a party to and therefore will not be bound by any judgment entered in the Texas proceedings.

16. California Inheritance Tax proceedings began with the appointment by the Superior Court, Los Angeles County, of an Inheritance Tax Referee to inventory and appraise the estate under California Probate Code § 605 and California Revenue and Taxation Code §14501 *et seq.*, On August 24, 1977, the California Special Administrator submitted the California Inheritance Tax Declaration to the Referee. The Special Administrator's Declaration asserted that decedent was a Nevada domiciliary and reported only tangible personal and real property located in California. The Inheritance Tax Referee has informed the Controller that he intends to file a report stating that there is now due an inheritance tax on the entire estate, less the real and tangible personal property located outside of California, on the basis that decedent was a California domiciliary. Notice of the filing of the report will be sent as required by law to all known persons potentially liable for tax. Objections to the Report based *inter alia*, on the claim of Nevada domicile, will be filed by the Estate. These steps have not been taken to date because California has been enjoined in the federal interpleader suit described below from taking any steps in its state courts to assert a claim for death taxes based on domicile. The question of decedent's domicile is therefore an issue in the California proceedings.

17. The State of Nevada imposes no inheritance tax. In the Nevada proceedings, final judgments have been rendered determining that (a) a holographic will (the so-called "Mormon Will") which was offered for probate, was not genuine; and (b) the claim of the Howard Hughes Medical Institute, a nonprofit corporation, that pursuant to an alleged lost will all the assets of the estate were devised to it was without basis in fact.

18. On May 4, 1976, Summa Corporation instituted an interpleader action in the Chancery Court of New Castle County, Delaware, seeking cancellation of its outstanding shares in decedent's name and direction from the court as to whom the shares should be reissued. Delaware jurisdiction was

asserted on the basis of 8 Delaware Code §169, which provides that the situs of shares in a Delaware corporation is Delaware, regardless of where the physical certificates representing the shares are located. On the date the complaint was filed, the Delaware Chancery Court entered an order requiring Summa to recognize William Lummis, contemporaneously appointed as ancillary administrator of the estate in Delaware, as its sole shareholder *pendente lite*. The California Controller is not a party to the Delaware suit and will not be bound by any judgment entered therein.

19. At present, therefore, the issue of decedent's domicile is pending in the courts of California and Texas, with the Estate, through the personal representative in each state, asserting Nevada domicile in each jurisdiction. Neither Texas nor California is, or will become, a party to the proceedings in the other's courts, with the result that neither will be bound by an adverse determination in the other's forum. Under established principles of law, the courts of each state may render contradictory findings of domicile and those conflicting determinations would not be subject to review by this Court.

20. In 1978, this Court denied California's motion for leave to file a complaint against the State of Texas. *California v. Texas,* 437 U.S. 601 (1978). Thereafter, the Estate filed an action in the United States District Court for the Western District of Texas, purporting to invoke the jurisdiction conferred by the Federal Interpleader Act. The taxing officials of California and Texas were named as Defendants. The District Court enjoined California and Texas from taking any step to collect a domicile based death tax pending further proceedings. Following extensive briefing and argument, the District Court (a) denied California's motion to add the acknowledged heirs of Howard Hughes as parties; and (b) denied California's action to change venue to a district court other than one sitting within one of the two claimant states. However, the District Court subsequently determined that it lacked subject matter jurisdiction under the Interpleader Act and dismissed the

complaint. 491 F. Supp. 5 (W.D. Tex. 1979). The Court of Appeals affirmed the further rulings, but held that the District Court did have jurisdiction. 629 F.2d 337 (5th Cir. 1980). A timely petition for rehearing *en banc* was denied on December 12, 1980.

21. The Court of Appeals found statutory interpleader jurisdiction under 28 U.S.C. §1335. That section requires that there be at least two "claimants" who are "citizens" of diverse states. The District Court had held, and the Court of Appeals did not question, that neither California nor Texas (nor their respective taxing officials) are "citizens of a state" under the Interpleader Act. The Court of Appeals nevertheless held that the statutory requirement of two claimants of diverse citizenship was satisfied. It held that (a) the Plaintiff administrator, a citizen of Texas, was also an interested "claimant" whose citizenship could be considered for jurisdictional purposes; and (b) under California law, a fraction of the state death tax is paid to the county treasurer as a commission for collecting the death tax and remitting it to the State Controller, with the result that the Los Angeles County Treasurer is a "claimant" and a "citizen" of California. On January 1, 1981, after the time for filing a petition for rehearing had expired, an extensive revision to the California inheritance tax law became effective. This amendment eliminated the participation of the County Treasurer in the collection of death taxes; such taxes are now paid directly to the State, and the county receives no portion of them. As a result, the premise of the Court of Appeals that the Los Angeles County Treasurer is a "claimant" to any part of the Hughes estate is now clearly incorrect. A motion for leave to file a petition for rehearing out of time was filed with the Court of Appeals for the purpose of bringing this development to its attention. The motion was denied, without comment, on January 23, 1981. Accordingly, the effect of this statutory revision on the District Court's jurisdiction has not been resolved by the Court of Appeals.

V.
CONTROVERSY BETWEEN STATES

22. The effective rate of California tax applicable to the Estate is 24% on all amounts in excess of $400,000. Similarly, the effective rate of Texas tax on amounts exceeding $1,000,000 is approximately 16%. The federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes. The combined marginal tax rate is therefore 101%. Interest on unpaid death taxes in California accrues at the rate of 12%. Interest on the Texas tax accrues at 6%. Interest on the federal tax accrues at a variable rate which is presently 12%. Some expenses actually incurred by the estate are not deductible under the applicable tax laws. As a consequence of these factors, the total federal and state estate and inheritance taxes and interest claimed substantially exceed the available assets of the estate.

23. The death tax claims of California and Texas are each based upon an assertion that Hughes was a domiciliary at the date of his death. The laws of each state utilize the identical legal definition of "domicile." Under each state's law, there can be but one domicile at any time. The claim of Texas is therefore wholly inconsistent with the claim of California.

24. Texas claims a lien on all intangible assets of the Estate to secure its domicile-based death tax claim. California asserts an identical lien. Because Hughes was a domiciliary of California and not of Texas, the Texas lien is invalid, and does not constitute a lien superior to the lien asserted by California.

25. For the reasons stated in paragraph 21 above, no lower federal court has subject-matter jurisdiction over this controversy under the Federal Interpleader Act. Moreover, once an interpleader suit is brought by an estate against two or more states, and the issues are joined, the suit becomes a "controversy between two or more states" (28 U.S.C. §1251(a)) within the original and exclusive jurisdiction of this Court.

Were the statutory interpleader suit commenced by the Estate in the Western District of Texas allowed to proceed, it would represent an attempt to adjudicate a controversy between California and Texas as to which state is entitled to tax the Estate on the basis of domicile. Such an adjudication is beyond the jurisdiction of the District Court. Even if this were not so, the Federal Interpleader Act, as presently written, does not offer an appropriate alternative means of resolving inconsistent death tax claims of two or more states. Under the Act's venue provisions, such suits must be brought in one of the claimant states, and under 28 U.S.C. §1404(a), the action can only be transferred to a district where the suit might have been brought in the first instance. In all probability, a jury trial is required if any party requests it. Thus the death tax claim of a sovereign state will be determined by persons who are citizens of the rival claimant state. This procedure is wholly inappropriate for the resolution of conflicting death tax claims of states. For all of these reasons, a statutory interpleader action in a district court is not an available and appropriate alternative remedy.

26. The domicile claim of Texas is without factual basis. If unrestrained, Texas will endeavor to perfect its trial court judgment finding a Texas domicile and to enforce that judgment and the lien on intangible assets which Texas has to secure payment of Texas death taxes. It is highly probable that this will occur before California can obtain a final judgment in its own courts on its death tax claim. The overwhelming majority of the Estate's tangible assets are located outside of California, and the Estate intends to administer the tangible assets in one or more states other than California. As a result, payment of the death tax claim of Texas will deprive California of its property right in the lien on Estate assets, and will prevent California from collecting the entire death tax and interest due to it. Moreover, the mere existence of the inconsistent Texas claim—and the lack of any alternative forum in which to obtain a determination of domicile binding on both states—will substantially impair the opportunity California might otherwise have to negotiate a fair and reasonable compromise of its tax

claim against the Estate. Accordingly, California will be irreparably injured if Texas is permitted to impose and collect an inheritance tax based on a determination by a Texas court of a Texas domicile.

27. This suit is being brought on behalf of the State of California to protect its statutory inheritance tax lien on the Estate and to collect any lawfully imposed tax thereon, and not on behalf of the Estate or any other person or entity.

WHEREFORE, Plaintiff prays that:

(a) The Court grant leave to file the instant complaint and issue its summons to the Defendants named herein;

(b) The Court refer the matter to a Special Master;

(c) The Court declare that California was the domicile of Hughes on the date of his death for purposes of death taxation and that the statutory lien on intangible assets of the Estate claimed by Texas is invalid; and

(d) The Court grant such other and further relief as may be just and proper.

DATED: March 12, 1981.

Respectfully,

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